SUPREME COURT, U. S.

FEB 18 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Number 1053

MRS. FRANCES FAIRCLOTH
and RUEL FAIRCLOTH,

Petitioners

V.

JAMES FLETCHER HESTER,

Respondent

PETITION FOR WRIT OF CERTIORARI

BRIEF OF RESPONDENT

Attorneys for Respondent:

Albert W. Stubbs
Richard Y. Bradley
HATCHER, STUBBS, LAND & ROTHSCHILD
P. O. Box 469
Columbus, Georgia, 31902

JESSE G. BOWLES
Attorney at Law
Cuthbert, Georgia

HOWARD PRINTING CO. COLUMBUS, GA.

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Question Presented for Review	1
Statement of the Case	1
Argument	2
Conclusion	6
Certificate of Service	8

TABLE OF AUTHORITIES

Page

CASES CITED

Cornett v. McWaters et al,
101 Ga. App. 120, 112 S. E. 2d 797 4

Hatcher v. Seitz et al,
87 Ga. App. 787, 75 S. E. 2d 273 5

Hightower v. Landrum,
109 Ga. App. 510, 136 S. E. 2d 425 5

Read v. City and Suburban Railway Company,
115 Ga. 366, 41 S. E. 629 3

Taylor v. Young & Company et al,
21 Ga. App. 40, 93 S. E. 558 4

The Metropolitan Street Railroad Co. v. Powell,
89 Ga. 601, 16 S. E. 118 2

Warnock v. Elliott et al,
96 Ga. App. 778, 101 S. E. 2d 591 4

STATUTES CITED

Georgia Code (1933) §4-101 4

Georgia Code (1933) §105-205 2

TREATISE CITED

Blashfield, **Cyclopedia of Automobile Law and Practice,** Vol 4, §2491, page 656 et seq 2

In The Supreme Court Of The United States

Number_____

MRS. FRANCES FAIRCLOTH
and RUEL FAIRCLOTH,

Petitioners

V.

JAMES FLETCHER HESTER

Respondent

PETITION FOR WRIT OF CERTIORARI

BRIEF OF RESPONDENT

QUESTION PRESENTED FOR REVIEW

The question presented for review here is whether the Court of Appeals has misapplied the law of Georgia in affirming the District Court's submitting to the jury the issue of the imputability to Petitioners of the alleged negligence of the driver of the automobile in which one of the Petitioners was a passenger at the time of the accident giving rise to the law suit.

STATEMENT OF THE CASE

This action was brought to recover damages allegedly arising from an automobile collision which occurred in Lumpkin, Georgia. After a lengthy trial, the jury returned a verdict for the Defendant. Petitioners did not question the fact that there was ample evidence in the record to show that the Petitioner's driver was negligent at the time of the collision. They contended only that such negligence was not imputable to them.

The evidence upon which this question turns comes directly from the mouth of one of the Petitioners, who admitted on cross examination that she planned the trip, decided where to go, how long to stay and when to come back. She told the

driver where to drive and when to leave and start back. She paid for all of the gasoline and guessed that the driver was driving for her. (T-133)

In the light of this evidence, the District Court submitted the question of the imputability of the Petitioner's driver's negligence to the jury, and the Fifth Circuit, in its **per curiam** decision, affirmed the action of the lower court.

ARGUMENT

Petitioners apparently base their reason for review by this Court on the grounds that the decision of the Court of Appeals conflicts with the law of the State of Georgia. However, when the applicable statutes and appellate decisions are examined, it is clear that the decision of the Court of Appeals was correct and follows the Georgia law.

The rule of law in Georgia is in accord with the rule almost universally followed.[1] Here, the law is codified:

> "Imputable negligence; principal and agent; parent and child. — For the negligence of one person to be properly imputable to another, the one to whom it is imputed must stand in such a relation of privity to the negligent person as to create **the relation of principal and agent.** In a suit by an infant, the fault of the parents, or of the custodians selected by the parents, is not imputable to the child." (emphasis supplied)
>
> Ga. Code (1933) §105-205

This sections appears to be an outgrowth of the earlier case law in Georgia. The rule and its exceptions appear as early as 1892:

> "7. If the plaintiff herself was free from negligence and her injury was due to the concurrent negligence of the railroad company and the person with whom she was riding in a wagon, he not being her servant and it not appearing that the she was the owner of the horse and wagon or that she had any

---

[1]Blashfield, **Cyclopedia of Automobile Law and Practice,** Vol. 4, §2491, page 656, et seq.

> agency or concern in procuring or in driving the same, and nothing appearing which tends to show that she was aware of any incompetency in the driver, the company is liable to her for all damages consequent upon the injury, and can take no credit as to any part thereof on account of the contributory negligence of the driver of the wagon."
>
> **The Metropolitan Street Railroad Co. v. Powell**
> 89 Ga. 601 at 602,
> 16 S. E. 118

Even then, in contemporary decisions, the Courts referred to the rule as "an ancient rule".[1]

This principle has been applied down through the years without modification, so that, today, the law has crystallized into the proposition that the negligence of a driver will not be imputed to his passengers unless

1. the relation of master-servant exists;

2. the relation of principal and agent exists; or

3. the two are engaged in a joint enterprise in which the passenger has the right and exercises control over the driver.

Respondent does not now and has never contended that the first or third relationship existed between the Petitioner and her driver. There is no evidence of a contract of employment creating the relationship of master and servant, no evidence of a community of interest between passenger and driver sufficient to invoke the joint enterprise theory. Respondent does contend, however, that the evidence is more than ample to show the relationship of principal and agent.

The real question before the Court of Appeals, then, was whether the exception to the general rule of imputable negligence applicable between principal and agent applies; or, in its simplest form—Was their sufficient evidence of a principal-

---

[1]**Read v. City and Suburban Railway Company** (115 Ga. 366, 41 S. E. 629)

agent relationship between Petitioner and her driver to submit that question to the jury. If so, then it necessarily follows that the charge on imputable negligence was authorized.

The Georgia Code defines the principal-agent relationship as follows:

> "The relation of principal and agent arises wherever one person, expressly or by implication authorizes another to act for him, or subsequently ratifies the acts of another in his behalf."
>
> Georgia Code (1933) §4-101

The Georgia courts have held that, if there is any evidence tending to establish agency, the question should be submitted to the jury. **(Warnock v. Elliott et al.,** 96 Ga. App. 778 at 789, 101 S. E. 2d 591). The fact of agency may be proved by conduct and circumstances, including declarations of the principal. **(Taylor v. Young & Company et al.,** 21 Ga. App. 40, 93, S. E. 558).

The Georgia Court of Appeals has applied the Georgia law to facts remarkably similar to the evidence in this case.

> "4. Special ground 9 (numbered 12 by counsel), assigns error on the following excerpt from the charge of the court. 'I further charge you that if you find in this case now on trial that the son of the plaintiff was acting under her direction and control and **in and about her business,** then and in that event, any negligence, if you should find negligence on the part of the son, would be imputable to the plaintiff, just as though she had committed the acts of negligence herself.' The evidence shows that the driver of the car was the minor son of the plaintiff and that he was driving the car while transporting his mother to her work. Such a situation justified the charge as given by the court."
>
> **Cornett v. McWaters et al.**
> 101 Ga. App. 120 at 122,
> 112 S. E. 2d 797.

Reviewing again the evidence here the Petitioner Mrs. Faircloth planned the trip, decided where to go, how long to stay and when to come back. She told the driver where to drive and when to leave and start back. She paid for all of the gasoline and guessed the driver was **driving for her.** (T-133).

Recently, the Georgia Court of Appeals has held that the following testimony by a principal authorized imputation of negligence:

> " 'On the day of the wreck [Wille Hightower] was working for me, driving the vehicle under my control and direction. The only purpose Willie had in the truck was to assist me in getting [to] and to do the work that I directed him to do.' "
>
> **Hightower v. Landrum**
> 109 Ga. App. 510, 516,
> 136 S. E. 2d 425.

The Court of Appeals had to look no further than the mere statement of the Petitioner Mrs. Faircloth that the driver was **driving for me** to find that the question of agency was quite properly submitted. So held the Georgia Court of Appeals in the case of **Hatcher v. Seitz et al.**

> "Felton, J. The plaintiff in error contends that the court erred in granting a nonsuit because the evidence presented a question for the jury as to agency. We agree. The plaintiff testified that the defendant Truelove told him, 'Mr. Seitz was driving the car for me.' The word 'for' as used with its context in such statement means 'on behalf of' the defendant Truelove. **Cheslea Corp. v. Steward,** 82 Ga. App. 679, 686 (62 S. E. 2d 627); **Young v. Wilson,** 183 Ga. 59, 74 (187 S. E. 44); 17 Words & Phrases, p. 215. Truelove denied having made such a statement and testified that Seitz had merely borrowed the automobile for his own personal use. Nothing else appearing, the jury could have believed the plaintiff and disbelieved all the evidence tending to disprove agency and could have found that at the time of the collision Seitz was the defendant Truelove's agent acting for and on behalf of Truelove."
>
> 87 Ga. App. 787 at 788
> 75 S. E. 2d 273.

Since it is clear that the lower Court was authorized to put the question of agency to the jury based on the acknowledgment of Petitioner Mrs. Faircloth that **he was driving for her,** there certainly can be no error, here, in view of the further evidence of agency apparent in the record and in view of the record's being completely devoid of any evidence disproving agency.

If the charge on agency was proper, then the charge in imputed negligence was authorized.

CONCLUSION

Petitioners contend that the Circuit Court of Appeals has overruled two lines of decisions in Georgia, i. e.

1. The passenger for hire decisions; and
2. The imputed negligence decisions.

This contention is absolutely without merit.

First, the passenger for hire question has no application in this case. That issue arises only when there is a claim by the passenger against his driver which requires a determination of the degree of care owed by the driver to his passenger. Although counsel for Petitioners states in his petition that the courts passed upon the question of imputable negligence in the passenger for hire decisions which he cites, we have carefully studied each such decision and cannot find the slightest reference to imputable negligence.

Second, the imputable negligence question is controlled by a rule having well-defined exceptions. This case fits squarely the exception recognized in principal and agent situations.

Applying the evidence in this case to the foregoing statutes and decisions, it is clear that the opinion of the Court of Appeals was in accord with the law of the State of Georgia. The question raised by these Petitioners was considered by the District Court and a panel of the United States Court of Appeals, all of whom have agreed that the question of the imputability of the negligence of the Petitioner's driver was a proper question for the jury to decide. Their application of

the law of Georgia was eminently correct; therefore, Respondent respectfully requests that the Petition for Certiorari be denied.

Albert W. Stubbs
Richard Y. Bradley
HATCHER, STUBBS, LAND & ROTHSCHILD
P. O. Box 469
Columbus, Georgia 31902

JESSE G. BOWLES
Cuthbert, Georgia

BY: Albert W. Stubbs
Attorneys for Respondent

CERTIFICATE OF SERVICE

STATE OF GEORGIA,
COUNTY OF MUSCOGEE:

I DO HEREBY CERTIFY that I have this 17th day of February, 1969, served Petitioners by mailing a copy of the foregoing Brief of Respondent to the Honorable L. B. Kent, 311 Columbus Bank and Trust Company Building, Columbus, Georgia, 31901, attorney of record for Petitioners.

Albert W. Stubbs

Of Counsel for Respondent